Supreme Court, U.S.
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No. 90-1718

# In the Supreme Court of the United States

OCTOBER TERM, 1990

ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, ET AL., PETITIONERS

*v.*

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION AND CHEMICAL WASTE MANAGEMENT, INC., RESPONDENTS

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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## QUESTION PRESENTED

Whether Ala. Code § 22-30-11(b), which expressly prohibits the disposal within Alabama of hazardous waste generated in other States that fail to comply with criteria specified by Alabama—and which Alabama has interpreted to bar disposal of hazardous waste generated in 22 States and the District of Columbia—violates the Commerce Clause.

## RULE 29.1 STATEMENT

Pursuant to Rule 29.1 of the Rules of this Court, respondent Chemical Waste Management, Inc., states that its parent corporation is Waste Management, Inc. Chemical Waste Management, Inc.'s subsidiaries (other than wholly owned subsidiaries) are The Brand Companies, Inc.; General Nuclear Systems, Inc.; Cemtech Management, Inc.; and Cemtech LP.

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED | I |
| RULE 29.1 STATEMENT | II |
| OPINIONS BELOW | 1 |
| JURISDICTION | 1 |
| STATEMENT | 2 |
| A. Regulatory Background | 2 |
| B. The Challenged Statute | 4 |
| C. The Decisions Below | 6 |
| ARGUMENT | 8 |
| A. The Court Of Appeals Correctly Held That The Holley Bill Violates The Commerce Clause | 8 |
| 1. Hazardous Waste Is An Article Of Commerce Protected By The Commerce Clause | 8 |
| 2. The Holley Bill Unlawfully Discriminates Against Interstate Commerce | 10 |
| B. There Is No Conflict Among The Lower Courts Regarding The Question Presented In This Case | 17 |
| CONCLUSION | 19 |

## TABLE OF AUTHORITIES

Cases: Page

*Alabama* v. *United States Environmental Protection Agency*, 871 F.2d 1548 (11th Cir.), cert. denied, 110 S.Ct. 538 (1989) ..... *passim*
*Bill Kettlewell Excavating, Inc.* v. *Michigan Dep't of Natural Resources*, 1991 WL 65771 (6th Cir. May 1, 1991) ..... 18
*Chemical Waste Management, Inc.* v. *Alabama Dep't of Revenue*, No. CV-90-1098 (Ala. Cir. Ct. Feb. 28, 1991), appeal pending, No. 190-1043 (Ala. Sup. Ct.) ..... 6, 17, 18
*City of Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978) ..... *passim*
*Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U.S. 366 (1976) ..... 11
*Hardage* v. *Atkins*, 582 F.2d 1264 (10th Cir. 1978) ..... 18
*Hazardous Waste Treatment Council* v. *South Carolina*, 32 Env't Rep. Cas. (BNA) 1646 (D.S.C. 1991) ..... 18
*Healy* v. *Beer Institute, Inc.*, 109 S. Ct. 2491 (1989) ..... 14
*Hughes* v. *Oklahoma*, 441 U.S. 322 (1979) ..... 11
*Illinois* v. *General Electric Co.*, 683 F.2d 206 (7th Cir. 1982), cert. denied, 461 U.S. 913 (1983) ..... 17
*Maine* v. *Taylor*, 477 U.S. 131 (1986) ..... 15, 16
*New Energy Co. of Indiana* v. *Limbach*, 486 U.S. 269 (1988) ..... 10, 11
*Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970) ..... 7
*South-Central Timber Development, Inc.* v. *Wunnicke*, 467 U.S. 82 (1984) ..... 13
*Sporhase* v. *Nebraska ex rel. Douglas*, 458 U.S. 941 (1982) ..... 10, 11
*Washington State Building & Construction Trades Council* v. *Spellman*, 684 F.2d 627 (9th Cir. 1982), cert. denied, 461 U.S. 913 (1983) ..... 17
*Wisconsin Dep't of Industry, Labor & Human Relations* v. *Gould Inc.*, 475 U.S. 282 (1986) ..... 13

TABLE OF AUTHORITIES—Continued


| Statutes and Regulations: | Page |
|---|---|
| Resource Conservation and Recovery Act | |
| 42 U.S.C. § 6901 *et seq.* | 2 |
| 42 U.S.C. § 6925 | 2 |
| 42 U.S.C. § 6924 | 3 |
| Comprehensive Environmental Response, Compensation and Liability Act | |
| 42 U.S.C. § 9604(c)(9) | *passim* |
| Toxic Substances Control Act | |
| 15 U.S.C. § 2601 *et seq.* | 4 |
| Ala. Code § 22-30-11(b) | 5, 10 |
| Ala. Code § 22-30-12(i) | 5 |
| Ala. Code § 22-30B-2.3 (1990 Supp.) | 17 |
| 40 C.F.R. Part 268 | 3 |
| 40 C.F.R. Parts 260-271 | 2 |
| Miscellaneous: | |
| R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* (6th ed. 1986) | 19 |
| [Current Developments] Env't Rep. (BNA) 2028 (Mar. 15, 1991) | 15 |
| 132 Cong. Rec. S14924 (Oct. 3, 1986) | 15 |

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## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A22) is reported at 910 F.2d 713 and the opinion of the court of appeals modifying its opinion and denying the petition for rehearing (Pet. App. A23-A29) is reported at 924 F.2d 1001. The opinion of the district court (Pet. App. A30-A56) is reported at 729 F. Supp. 792.

### JURISDICTION

The judgment of the court of appeals was entered on August 8, 1990. A petition for rehearing was denied on February 7, 1991. The petition for a writ of certiorari was filed on May 7, 1991. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## STATEMENT

### A. Regulatory Background

Disposal of hazardous waste is strictly regulated under federal law. The Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 *et seq.*, and the regulations promulgated by the Environmental Protection Agency pursuant to that statute (see 40 C.F.R. Parts 260-271), impose elaborate requirements for the safe handling and disposal of hazardous waste. "The RCRA establishes a framework for regulating the storage and disposal of hazardous wastes in general. * * * * The regulations promulgated pursuant to the RCRA ensure that facilities disposing of hazardous wastes do so in a manner consistent with eliminating health and environmental risks caused by the hazardous wastes." *Alabama* v. *United States Environmental Protection Agency*, 871 F.2d 1548, 1552 (11th Cir.), cert. denied, 110 S.Ct. 538 (1989) (citations omitted). RCRA provides that all operators of hazardous waste treatment, storage, or disposal facilities must obtain permits fixing the terms on which the operator may engage in those activities. 42 U.S.C. § 6925.[1]

Federal law recognizes that, for the foreseeable future, some hazardous waste must be disposed of in landfills. Congress in 1984 specified that land dis-

[1] Petitioners advert throughout the petition to the dangers associated with hazardous waste. They ignore the fact that federal and state regulatory requirements minimize to a substantial degree any threat to public health or the environment. When such waste is properly managed pursuant to the applicable federal and state regulations, any health hazard is minimal. *Alabama* v. *United States Environmental Protection Agency*, 871 F.2d at 1552-1553.

posal of hazardous waste would be permitted only after such waste is treated with the "best available demonstrated technology" in order to reduce the waste's toxicity and mobility. 42 U.S.C. § 6924. The EPA has promulgated regulations setting forth these technological requirements. Those regulations make clear that land disposal—after pretreatment—remains the only feasible means of disposal for some types of hazardous waste. See generally 40 C.F.R. Part 268.

Acknowledging the continued need for hazardous waste disposal sites, Congress has sought to stimulate expansion of the Nation's disposal capacity by encouraging development of new disposal sites. Congress concluded in 1986 that local political pressures —the so-called "not in my backyard" syndrome—had blocked creation of new facilities. It therefore added Section 104(c)(9) to the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9604(c)(9), which provides States with an incentive to authorize the siting of new disposal facilities. That statute required each State to provide to the EPA—by October 17, 1989—assurances showing that the State will have adequate capacity (either within the State or outside the State in accordance with an interstate or regional agreement) to dispose of hazardous waste generated within the State over the next 20 years. If a State fails to provide such assurances, or the State's assurances are deemed inadequate by the EPA, federal Superfund monies for long-term remediation of unsafe hazardous waste sites may not be spent within that State. See also Pet. App. A3-A5.[2]

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[2] Section 104(c)(9) does not direct that waste generated within a State be disposed of at the disposal facilities refer-

**B. The Challenged Statute**

Respondent Chemical Waste Management, Inc. (CWM), owns and operates a commercial hazardous waste disposal facility located near the town of Emelle, Alabama (the "Emelle facility"). That facility has received a RCRA permit from the EPA, as well as a separate permit—issued by the EPA pursuant to the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2601 *et seq.*—authorizing the disposal of polychlorinated biphenyls (PCBs). These permits establish that the Emelle facility "has complied with elaborate federal regulations designed to ensure the safe disposal of hazardous wastes * * *. To the extent these federal regulations can and do provide for the safe treatment and disposal of toxic wastes, CWM's Emelle, Alabama, facility poses no threat to the health and safety of the residents of Emelle or to other Alabama residents." *Alabama* v. *United*

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enced in that State's capacity assurance plan. Pet. App. A14 (holding by the court below that in Section 104(c)(9) "Congress has not, in our opinion, authorized Alabama to restrict the free movement of hazardous waste across Alabama's borders"). As the United States explained in its *amicus* brief in the court of appeals filed in support of respondents (at 9),

> the capacity assurance program is aimed at creating adequate capacity nationwide to provide for the disposal of hazardous wastes expected to be generated during the next twenty years. With adequate capacity in place, generators and disposers of hazardous wastes can choose between the alternative facilities available for the actual disposal of wastes based on market conditions. The capacity assurance program is not designed to dictate where each state's hazardous waste will actually be deposited. It is designed to ensure sufficient overall national capacity within which a national market may work effectively.

*States Environmental Protection Agency*, 871 F.2d at 1552-1553.[3] Before the statute challenged in this case took effect, waste generated in almost every State moved in interstate commerce for disposal at the Emelle facility. Pet. App. A2.

In 1989, the Alabama Legislature enacted—and the Governor signed into law—Ala. Act No. 89-788 (codified at Ala. Code § 22-30-11(b)), popularly known as the "Holley Bill."[4] That measure bars any commercial hazardous waste disposal facility located in Alabama (only the Emelle facility meets this definition) from treating or disposing of hazardous waste generated outside Alabama if the State in which the waste was generated either (1) prohibits the treatment or disposal of hazardous waste within its borders and has no hazardous waste treatment and disposal facility; or (2) has no facility within the State for the treatment or disposal of hazardous waste and has not entered into an interstate or regional waste disposal agreement to which Alabama is a signatory. The statute also prohibits commercial waste management facilities in Alabama from contracting with any State other than Alabama to satisfy that State's federal capacity assurance obligation.[5]

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[3] The Emelle facility also is regulated under Alabama law. Currently, the facility is authorized to operate pursuant to the interim status procedures set forth in Ala. Code § 22-30-12(i).

[4] Representative Holley was the author of the statute.

[5] The Holley Bill is not Alabama's only attempt to prevent the disposal within Alabama of hazardous waste generated in other States. In 1988, Alabama state officials sought to halt the cleanup of an abandoned hazardous waste site in Texas

Defendants have concluded that 22 States and the District of Columbia do not satisfy the conditions set forth in the Holley Bill. They have therefore prohibited the Emelle facility from accepting for disposal any waste generated in those States. Waste from 17 of those States was formerly transported in interstate commerce for disposal at the Emelle facility. Pet. App. A7.

**C. The Decisions Below**

CWM and the National Solid Wastes Management Association, a trade association whose members are engaged in the interstate transportation and disposal of hazardous waste in Alabama and other States, instituted this action in the United States District Court for the Northern District of Alabama challenging the constitutionality of the Holley Bill.[6] The dis-

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because the waste was to be disposed of at the Emelle facility. That effort was unsuccessful. *Alabama* v. *United States Environmental Protection Agency, supra.* In 1990, Alabama adopted a discriminatory $72 per ton fee on the disposal within Alabama of waste generated in other States (the fee did not apply to the disposal of waste generated in Alabama). That fee was held invalid under the Commerce Clause. *Chemical Waste Management, Inc.* v. *Alabama Dep't of Revenue,* No. CV-90-1098 (Ala. Cir. Ct. Feb. 28, 1991), appeal pending, No. 190-1043 (Ala. Sup. Ct.).

[6] The complaint also challenged the constitutionality of two sets of regulations issued by the Alabama Department of Environmental Management. The court of appeals held one set of regulations preempted by federal law and remanded the case to the district court for further proceedings on respondents' Commerce Clause challenge to the other set of regulations. Pet. App. A15-A23, A24-A29. The certiorari petition does not present any question concerning the court of appeals' ruling with respect to these measures. See Pet. 5 n.1.

trict court held the statute constitutional. Pet. App. A30-A56. The court concluded that "there is not significant discrimination against out-of-state economic interests sufficient to warrant striking the Holley Bill as unconstitutional." *Id.* at A53. Applying the test applicable to statutes that do not discriminate against interstate commerce set forth in *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970), the court concluded that the Holley Bill's "impact on interstate commerce is incidental and not excessive in relation to the local benefits." Pet. App. A53.

The court of appeals unanimously reversed. Pet. App. A1-A22. It first held that hazardous waste is an object of commerce protected under the Commerce Clause. *Id.* at A8-A10. The court next determined that the Holley Bill unlawfully discriminates against interstate commerce in violation of the Commerce Clause. Relying on this Court's conclusion in *City of Philadelphia* v. *New Jersey*, 437 U.S. 617, 626-627 (1978), that a legitimate state purpose "may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently," the court of appeals held that "[t]he Holley Bill plainly distinguishes among wastes based on their origin, with no other basis for the distinction" (Pet. App. A12). The court observed that "[o]n its face, the Holley Bill discriminates against out-of-state generators and imposes on these generators the burden of conserving Alabama's remaining hazardous waste disposal capacity." *Id.* at A12. It therefore concluded that the statute violated the Commerce Clause.[7]

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[7] The court of appeals subsequently denied petitioners' petition for rehearing and suggestion for rehearing en banc

## ARGUMENT

This Court held in *City of Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978), that New Jersey's ban on the disposal within its borders of waste generated in other States violated the Commerce Clause. The decision below correctly applies the principles announced in *City of Philadelphia*, which have been followed consistently by the lower courts to invalidate statutes that expressly discriminate against waste generated in other States. Indeed, petitioners' inability to cite any conflicting authority highlights the settled nature of this area of the law. This case simply does not present an important legal issue warranting this Court's attention. The petition for a writ of certiorari should be denied.

### A. The Court Of Appeals Correctly Held That The Holley Bill Violates The Commerce Clause.

The court of appeals correctly concluded that Alabama's ban on the disposal within its borders of hazardous waste generated in numerous other States discriminates against interstate commerce in violation of the Commerce Clause. Indeed, that determination rests on long-settled principles firmly rooted in this Court's Commerce Clause jurisprudence.

#### 1. *Hazardous Waste Is An Article Of Commerce Protected By The Commerce Clause.*

Petitioners assert (Pet. 17-20) that the protections of the Commerce Clause do not extend to hazardous waste that moves in interstate commerce. That con-

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(Pet. App. A24-A29), modifying its original opinion with respect to the Alabama regulations that are not at issue here (see note 6, *supra*).

tention is foreclosed by this Court's decision in *City of Philadelphia.*

The lower court in *City of Philadelphia* had "questioned whether the interstate movement of * * * wastes * * * is 'commerce' at all within the meaning of the Commerce Clause," relying on "several old cases" in which this Court had upheld state statutes banning the importation of substances infected with germs that would " 'spread disease, pestilence, and death.' " 437 U.S. at 621, 622 (citation omitted). Stating that the lower court had "misread [this Court's] cases," this Court held that "[a]ll objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset." *Id.* at 622.

This Court explained that the old cases relied on by the lower court in *City of Philadelphia* did not hold the Commerce Clause inapplicable to particular items of commerce, but were instead grounded in a determination that the state statutes did not violate the applicable Commerce Clause standard: "because the articles' worth in interstate commerce was far outweighed by the dangers inhering in their very movement, States could prohibit their transportation across state lines." 437 U.S. at 622. This Court squarely "reject[ed] the [lower] court's suggestion that the banning of 'valueless' out-of-state wastes * * * implicates no constitutional protection. Just as Congress has power to regulate the interstate movement of these wastes, States are not free from constitutional scrutiny when they restrict that movement." *Id.* at 622-623.

As the court of appeals held (Pet. App. A8-A9), this reasoning applies with equal force to haz-

ardous waste. Because hazardous waste plainly is an "object[] of interstate trade" and Congress clearly has the power to regulate the interstate movement of hazardous waste, "States are not free from constitutional scrutiny when they restrict that movement." *City of Philadelphia*, 437 U.S. at 622.[8]

### 2. *The Holley Bill Unlawfully Discriminates Against Interstate Commerce.*

There can be no doubt that the Holley Bill discriminates on its face against interstate commerce. The statute by its very terms applies only to waste generated "in any state outside the State of Alabama." Ala. Code § 22-30-11(b). And petitioners have interpreted the statute to bar the disposal within Alabama of waste from 22 States and the District of Columbia. That is the essence of discrimination against interstate commerce.

Petitioners suggest (Pet. 15, 17) that the Holley Bill is not discriminatory because it permits disposal within Alabama of waste generated in States that have satisfied a precondition that supposedly has been satisfied by Alabama. But this Court repeatedly has held that such reciprocity provisions—which condition equal treatment of products from other States on compliance with standards prescribed by the first State—discriminate against interstate commerce and must be measured by the strict scrutiny standard applicable to discriminatory state laws. *New Energy Co. of Indiana* v. *Limbach*, 486 U.S. 269, 273 (1988); *Sporhase* v. *Nebraska ex rel. Douglas*, 458

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[8] Petitioners' arguments rest on the alleged lack of "intrinsic value or usefulness" of hazardous waste (Pet. 19), but that is the very inquiry that this Court declined to undertake in *City of Philadelphia*.

U.S. 941, 958 (1982) (reciprocity requirement amounts to "facially discriminatory legislation"); *Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U.S. 366, 378-379 (1976).

Facial discrimination against interstate commerce "by itself may be a fatal defect, regardless of the State's purpose." *Hughes* v. *Oklahoma*, 441 U.S. 322, 337 (1979). To the extent it is not, the standard that a State must meet to carry this burden of justification is "high." *New Energy Co.*, 486 U.S. at 278; see also *Hughes* v. *Oklahoma*, 441 U.S. at 337 (the reviewing court must engage in "the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives"). A discriminatory statute is invalid unless the State carries its burden of showing that the statute "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *New Energy Co.*, 486 U.S. at 278. The court of appeals correctly held that petitioners failed to carry that burden.

Petitioners repeatedly emphasize the purported dangers of hazardous waste disposal (Pet. 12-15, 18-19) and assert that the Holley Bill is justified on environmental protection and public health grounds (Pet. 15). As the court of appeals held, however, "[e]ven if Alabama's purpose in enacting the Holley Bill was to protect human health and the environment in Alabama, that purpose 'may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently.'" Pet. App. A11-A12 (quoting *City of Philadelphia*, 437 U.S. at 626-627).

There is no dispute that "the types of wastes accepted at the Emelle facility did not vary based upon the states in which the wastes were generated. The Holley Bill plainly distinguishes among wastes based on their origin, with no other basis for the distinction." Pet. App. A12. The ban on out-of-state waste in *City of Philadelphia* could not be justified on environmental protection grounds because it did not apply evenhandedly to all waste disposed of in New Jersey but rather targeted only waste generated in other States. 437 U.S. at 626-628. So here, Alabama's partial ban on out-of-state waste may not be upheld on environmental protection grounds because it too discriminates against waste generated in other States.

Petitioners attempt (Pet. 15) to justify the Holley Bill on the ground that it is not a protectionist measure. That is simply wrong. As in *City of Philadelphia*, the statute here "imposes on out-of-state commercial interests the full burden of conserving the State's remaining landfill space." 437 U.S. at 628. The court of appeals properly "reject[ed] the district court's conclusion that, because Alabama closed its borders to only some states, Alabama is not hoarding its disposal capacity." Pet. App. A12. The Holley Bill burdens *only* out-of-state generators; no in-state generator is affected by the ban (Alabama has in addition exempted from that burden generators in States not subject to the ban). The effect of the statute unquestionably is to preserve disposal capacity at the Emelle facility for Alabama-generated and Alabama-approved waste by discriminating against interstate commerce. Moreover, Alabama has expressly banned a large component of interstate commerce. The fact that the Holley Bill discriminates against

some—rather than all—interstate commerce does not save the statute under the Commerce Clause. Rather, the Holley Bill's protectionist purpose and effect make clear that the statute is unconstitutional.

Petitioners also argue (Pet. 15) that the Holley Bill advances the legitimate local interest of promoting compliance by other States with the Section 104(c)(9) capacity assurance requirement.[9] To begin with, Congress itself provided a penalty for failure to comply with Section 104(c)(9)—loss of certain federal funds. See page 3, *supra*. Congress did not authorize the States to supplement that scheme with additional incentives or penalties. Promoting compliance with the federal obligation therefore is not a legitimate local interest. *Wisconsin Dep't of Industry, Labor & Human Relations* v. *Gould Inc.*, 475 U.S. 282, 291 (1986) (barring State from supplementing federal penalty scheme).[10]

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[9] Alabama does not—and could not—contend that the statute is necessary for its own compliance with Section 104(c)(9). See Pet. App. A11.

[10] Petitioners do not renew in this Court their contention that Congress in Section 104(c)(9) specifically authorized the States to adopt measures that discriminate against interstate commerce in hazardous waste. Applying the principle that such congressional authorization must be "unmistakably clear" (*South-Central Timber Development, Inc.* v. *Wunnicke*, 467 U.S. 82, 91 (1984)), the court of appeals properly determined that "nothing in [Section 104(c)(9)] evidences congressional authorization for each state to close its borders to wastes generated in other states to force those other states to meet federally mandated hazardous waste management requirements." Pet. App. A14 (footnote omitted). See also *id.* at A14-A15 n.12 (comparing Section 104(c)(9) to a statute that expressly does authorize States—in certain specified circumstances—to discriminate against interstate commerce in radioactive waste).

This purported interest is illegitimate for the additional reason that the Commerce Clause bars States from trying to control out-of-state conduct. See, *e.g.*, *Healy* v. *Beer Institute, Inc.*, 109 S. Ct. 2491, 2499 (1989) ("the critical inquiry [under the Commerce Clause] is whether the practical effect of the [State] regulation is to control conduct beyond the boundaries of the State"). Far from justifying the discriminatory statute, petitioners' argument confirms the unconstitutionality of the Holley Bill because it makes clear that the statute was designed to affect out-of-state activity, not in-state activity.

Moreover, the Holley Bill cannot be upheld on this ground because it is inconsistent with Section 104 (c) (9). The federal statute permits a State to meet its capacity assurance requirement by entering into an agreement with any other State. But the Holley Bill forbids the disposal within Alabama of waste generated in States that choose to base their capacity assurances on interstate agreements with States other than Alabama. The Holley Bill thus penalizes generators located in States that in fact have satisfied Section 104(c) (9). This critical defect makes clear that the Holley Bill cannot be justified as a device for implementing Section 104(c) (9).[11]

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[11] Indeed, petitioners assert (Pet. 11) that the Holley Bill coerced Vermont and Mississippi into authorizing new waste disposal facilities and intimate (Pet. 17) that disposal of waste from those States is no longer banned. In fact, Alabama continues to prohibit the disposal of waste generated within those States. This further demonstrates the lack of any relationship between the Holley Bill and Section 104(c) (9).

Petitioners' comments (Pet. 11-12) regarding North Carolina's alleged noncompliance with Section 104(c) (9) fail to note that the EPA—the federal agency charged with ensuring compliance with that statute—has informed the Governor of

Alabama's action is also inconsistent with the purpose of Section 104(c)(9), which was to *increase* the availability of disposal facilities. As Senator Chafee observed, "if RCRA and Superfund programs are to work—if public health and the environment are to be protected—the necessary sites must be made available." 132 Cong. Rec. S14924 (Oct. 3, 1986). The Emelle facility is one of those necessary sites yet Alabama seeks to restrict its availability.

Finally, petitioners contend (Pet. 12-15) that this Court's decision in *Maine* v. *Taylor*, 477 U.S. 131 (1986), supports the constitutionality of the Holley Bill. That case involved a Maine statute that banned the importation of out-of-state baitfish. This Court measured the constitutionality of the statute under the stringent strict scrutiny standard applicable to measures that discriminate against interstate commerce. It upheld the statute because Maine had "legitimate reasons, 'apart from their origin, to treat [out-of-state baitfish] differently.'" *Id.* at 152 (quot-*City of Philadelphia*, 437 U.S. at 627). The out-of-state baitfish had a physical characteristic—the presence of a parasite—that was "not common to wild fish in Maine" and, in addition, shipments of out-of-state baitfish could include non-Maine species that "could disturb Maine's aquatic ecology to an unpredictable extent." 477 U.S. at 141. The State proved that no measure short of a complete ban would allow

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North Carolina of the defects in that State's capacity assurances and sought further information regarding North Carolina's plan to ensure disposal capacity for hazardous waste. The EPA advised North Carolina that it faced the loss of federal funds if it failed to revise its capacity assurance plan so as to comply with Section 104(c)(9). [Current Developments] Env't Rep. (BNA) 2028 (Mar. 15, 1991).

the State to exclude non-Maine fish and fish with parasites effectively; existing sampling and inspection procedures would not allow identification of those fish. Because the purposes underlying the ban —protection of Maine fish from external threats— "could not adequately be served by available nondiscriminatory alternatives," the Court upheld the statute. *Id.* at 151.

*Taylor* thus rested squarely on this Court's determination that the record in that case established that out-of-state baitfish posed a substantially different threat to the environment than in-state baitfish. *Taylor* is inapplicable here because, as the court of appeals found (Pet. App. A12), petitioners have made no such factual showing. Rather, the record establishes that the hazardous waste whose disposal is banned does not differ in any respect from the hazardous waste whose disposal is permitted. "Alabama did not ban hazardous wastes from all other states on the ground that the wastes were dangerous to some human health or environmental aspect which Alabama has a right to regulate. Alabama's ban does not distinguish on the basis of type of waste or degree of dangerousness, but on the basis of the state of generation." Pet. App. A13. That is precisely what the Commerce Clause forbids.

Moreover, to the extent that Alabama's concern is that too great an amount of hazardous waste is being disposed of within the State, there is an available nondiscriminatory alternative to the Holley Bill. Alabama could have imposed a nondiscriminatory limit on the amount of waste disposed of within the State.[12] The existence of that alternative confirms

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[12] Any such measure would, of course, have to pass muster under the federal Constitution and applicable federal statutes

that the Holley Bill—one of the most blatantly discriminatory means by which to advance this interest —violates the Commerce Clause.

In sum, petitioners have failed to establish that the Holley Bill advances a legitimate local interest that could not be furthered by nondiscriminatory means. The statute plainly violates the Commerce Clause.

**B. There Is No Conflict Among The Lower Courts Regarding The Question Presented In This Case.**

In the years since this Court's decision in *City of Philadelphia*, the lower courts have decided a number of cases involving Commerce Clause challenges to state laws that discriminated on their face in favor of especially dangerous waste generated within the State and against especially dangerous waste generated in other States. In every case, the state law has been held to violate the Commerce Clause. *Illinois* v. *General Electric Co.*, 683 F.2d 206, 214 (7th Cir. 1982), cert. denied, 461 U.S. 913 (1983) (radioactive waste); *Washington State Building & Construction Trades Council* v. *Spellman*, 684 F.2d 627 (9th Cir. 1982), cert. denied, 461 U.S. 913 (1983);

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as well as state law. Alabama has enacted a provision imposing a cap on the amount of waste that may be disposed of at the Emelle facility. See Ala. Code § 22-30B-2.3 (1990 Supp.). That provision has been upheld by an Alabama trial court. *Chemical Waste Management, Inc.* v. *Alabama Dep't of Revenue*, CV-90-1098 (Ala. Cir. Ct. Feb. 28, 1991), appeal pending, No. 190-1043 (Ala. Sup. Ct.). CWM has appealed that decision because the cap provision itself violates the Commerce Clause (by singling out the Emelle facility and exempting facilities that dispose of hazardous waste generated within Alabama) as well as other provisions of federal and state law.

*Hardage* v. *Atkins*, 582 F.2d 1264, 1266 (10th Cir. 1978) ("controlled industrial waste"); *Hazardous Waste Treatment Council* v. *South Carolina*, 32 Env't Rep. Cas. (BNA) 1646 (D.S.C. 1991); *Chemical Waste Management, Inc.* v. *Alabama Department of Revenue*, CV-90-1098 (Ala. Cir. Ct. Feb. 28, 1991).[13]

Not one of these courts has questioned that all types of waste are articles of commerce entitled to the protections of the Commerce Clause. Moreover, all of these courts have applied the standard prescribed by this Court in *City of Philadelphia* and its progeny. There is no reason for this Court to review the court of appeals' application of settled principles in a manner consistent with the decisions of other lower courts.[14]

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[13] Petitioners argue in the stay application presented to Justice Kennedy that the decision below conflicts with *Bill Kettlewell Excavating, Inc.* v. *Michigan Dep't of Natural Resources*, 1991 WL 65771 (6th Cir. May 1, 1991). But that case involved a Michigan statute that required approval for disposal of out-of-*county* waste. The Sixth Circuit specifically distinguished the case before it from one involving a statute discriminating on its face against out of-*state* waste, observing that the language of the Michigan law "places in-county and out-of-county waste in separate categories, but it does not treat out-of-county waste from Michigan any differently than waste from other states." *Id.* at *4. That case is therefore wholly irrelevant here, where there is clear express discrimination against out-of-state waste.

[14] Petitioners suggest (Pet. 8-9) that this Court should grant review because this case formerly would have fallen within the Court's appeal jurisdiction. As petitioners acknowledge, however, this Court's jurisdictional statutes were amended in order to eliminate any obligation to decide cases not presenting important federal issues. Certiorari should not be granted precisely because there is no important issue

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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presented in this case. Indeed, in view of the settled nature of the legal principles applied by the court of appeals, an appeal in this case almost certainly would have been summarily affirmed on the ground that it raised no substantial federal question. R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 244-245 (6th ed. 1986).